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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Preemption of State and Local Zoning and
Land Use Restrictions on the Siting,
Placement and Construction of Broadcast
Station Transmission Facilities

MM Docket No. 97-182

**COMMENTS OF AIRPORTS COUNCIL INTERNATIONAL-
NORTH AMERICA**

The Airports Council International-North America ("ACI-NA") hereby submits its
comments on the Notice of Proposed Rule Making ("NPRM") released by the Commission on
August 19, 1997.¹

STATEMENT OF INTEREST

ACI-NA represents the local, regional and state governing bodies that own and operate
the principal airports served by scheduled air carriers in the United States. The U.S. airport
members of ACI-NA emplane more than 96 percent of the total domestic, and virtually all

¹ *Preemption of State and Local Zoning and Land Use Restrictions on the Siting,
Placement and Construction of Broadcast Station Transmission Facilities*, MM Docket No. 97-
182, Notice of Proposed Rulemaking, FCC No. 97-296 (August 19, 1997) ("NPRM").

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international, scheduled airline passenger and cargo traffic in the United States. ACI-NA's member airports are operated by, or are subject to, state and local political jurisdictions that use their zoning authority to protect the airspace of those airports. The airports rely on those authorities to enforce state and local statutes and ordinances that are critical to the safety of the flying public. The rules proposed by the National Association of Broadcasters and Association for Maximum Service Television ("Petitioners") would impair those enforcement efforts and should be rejected.

DISCUSSION

The navigable airspace around the nation's airports is protected from obstruction by both local zoning authorities and the Federal Aviation Administration ("FAA"). The FAA publishes standards for the guidance of zoning authorities in regulating the construction and alteration of structures that may affect the use of navigable airspace,² and requires persons intending to build or modify such structures to give notice to the FAA.³ The Congress has declined, however, to empower the FAA to prevent the building or alteration of structures that affect the use of navigable airspace. That responsibility rests exclusively with state and local authorities. The FAA interprets 14 C.F.R. Part 77 to require local authorities to zone to protect airspace

² See, e.g., FAA Advisory Circular 70/7460-2J, *Proposed Construction or Alternation of Objects that May Affect the Navigable Airspace*; FAA Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports*.

³ 49 U.S.C. §44718.

surrounding airports from obstructions and intrusions. Failure to protect the navigable airspace and the approaches to the airport could cause use restrictions including closure of the airport under some adverse weather conditions, where that closure would not be necessary absent the obstruction.

In the exercise of this important public safety responsibility, many states have adopted statutes and created commissions devoted to the zoning of airports and adjacent property. These long-standing enactments and enforcement bodies represent a store of specialized knowledge and experience, based upon knowledge of local conditions and the unique demands of aviation safety, that no distant federal agency not involved with air commerce can hope to match.

Effective zoning of airports and their vicinities is especially important in the present environment. At a time when air passenger traffic is growing at an annual rate of 4 percent for domestic flights and 6 percent for international flights, growth in airport capacity is heavily constrained by environmental concerns and the growth of metropolitan areas. No significant new air carrier airports are being proposed at the present time, and proposals to build new runways at existing sites invariably result in significant and protracted environmental controversy. For these reasons, growth in air travel for the foreseeable future will be accommodated largely within the existing system of airports and runways. Protection of the airspace needed to support existing airport approach and departure procedures is therefore more critical than ever before.

Against this background, Petitioners suggest that the Commission should preempt state and local regulation of the very structures that offer the highest potential threat to the integrity of navigable airspace. The Petitioners propose that the FCC prescribe the time limits within which state and local authorities must resolve requests to build, modify or replace broadcast towers, and

deem those requests approved where the time limits are not met.⁴ The Petitioners also propose that local authorities be given the burden of demonstrating the consistency of health or safety-based zoning and land use regulations with the Commission's policies concerning the promulgation of, and competition among, electronic media;⁵ and that the Commission, acting as an arbitrator, should substitute its judgment for that of local authorities when those authorities deny permission to build or modify broadcast antenna facilities.⁶

The Petitioners have given no justification for this sweeping preemption of state and local authority. The only purported basis for preemption in this case is the congressional directive to the FCC to recover broadcast spectrum from digital television ("DTV") licensees, and the FCC's own "accelerated schedule for construction of DTV transmission facilities. . ."⁷ Petitioners have not shown that the Congress's spectrum recovery policy, which contains no time limits, mandates the accelerated build-out schedule adopted by the Commission; neither have the Petitioners shown that, if Congress did implicitly mandate such a schedule, the exercise of state and local zoning authority would act as "an obstacle to the accomplishment and execution of the

⁴ NPRM Appendix B ¶(a).

⁵ *Id.* ¶b(2).

⁶ *Id.* ¶d.

⁷ NPRM ¶2.

full objectives of Congress.”⁸ This record cannot justify the extraordinary preemptive measures that Petitioners propose.

Even if the Congressional policy favoring spectrum recovery did provide a presumptive basis for preemption in this case, the FCC would be obligated -- as the NPRM expressly acknowledges -- to exercise that authority so as to reach “a fair accommodation between federal and nonfederal interests”⁹ that does not “unduly interfere with the legitimate affairs of local governments when they do not frustrate federal objectives.”¹⁰ The rules proposed by Petitioners do not remotely achieve such a reasonable accommodation, and are dangerously ill-suited to zoning decisions based on air safety.

The Petitioners’ proposed time limit rules, for example, provide that if a request to modify, relocate or construct a tower is not resolved within limits ranging from 21 to 45 days, that request will be deemed approved. This proposed rule takes no account of the complexities of airspace management; and approval of a tower siting or modification application by default, while perhaps of limited harm where a zoning authority’s objections are based on aesthetic or

⁸ *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 369 (1986); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

⁹ *Arecibo Radio Corporation*, 101 FCC 2d 545, 550 (1985).

¹⁰ NPRM ¶15 (citing *Preemption of Local Zoning Regulations of Receive-Only Satellite Earth Stations*, 100 FCC 2d 846, 853 (1985)).

economic considerations, may be catastrophic where a proposed tower poses a threat to air safety.

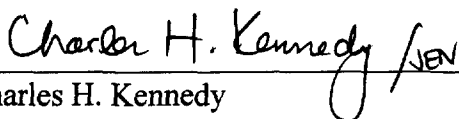
Similarly, the proposal that zoning authorities prove the consistency of their health and safety concerns with the promotion of competition in electronic media is equally misplaced where air passenger safety is a concern. The FCC's policy of promoting competition, however laudable, cannot be weighed in the same balance with air safety, and to require such a demonstration is a needless burden on state and local authorities.

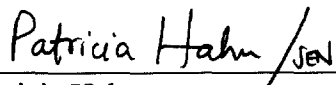
Finally, to interpose the FCC as an arbitrator where the merits of an airport zoning question are at issue will disrupt the long-standing partnership of the FAA and local zoning authorities through which air safety concerns historically have been addressed. The Congress cannot have intended this partnership to be replaced by an agency that lacks both the authority and the expertise to assume such a critical and specialized role.

For all of these reasons, the Commission should not adopt the proposed rules, or should provide that where a zoning authority finds that an application to build or modify a broadcast tower presents air safety issues, the FCC will neither impose time limits on the approval process, require the zoning authority to weigh air safety concerns against any FCC policy, or act as arbitrator in the event the application is denied.¹¹

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Respectfully submitted,


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¹¹ ACI-NA also urges that if some or all of the Petitioners' proposed rules are adopted, those rules should apply only to construction and modification of digital television towers in the ten largest markets, where the Commission's construction schedule is most stringent. The Petitioners have failed entirely to demonstrate any need for application of their proposed rules to DTV construction outside the ten largest markets, or to broadcast towers generally.